(12)

No. 90-1102

IN THE

# Supreme Court of the United States

October Term, 1990

ROBERT E. GIBSON,

*Petitioner,*

*v.*

THE FLORIDA BAR, *et al.*,

*Respondents.*

**On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE STATE BAR OF WISCONSIN *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## BRIEF OF THE STATE BAR OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

By consent of the parties,[1] the State Bar of Wisconsin ("Wisconsin Bar") submits this brief in support of respondents, who seek affirmance of the judgment of the United States Court of Appeals for the Eleventh Circuit that the Florida Bar's procedures for handling objections to its use of compulsory bar dues to fund political lobbying substantially satisfies the constitutional requirements enunciated by this Court in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986).[2]

[1]Consistent with this Court's Rule 37.3, the written consents of the parties accompany the filing of this *amicus* brief.

[2]While the Eleventh Circuit held that the Florida Bar's procedures were in substantial compliance with *Hudson,* the court also held that the Bar's method of calculating interest generated from dissenters' dues from the date that the Bar was notified of the dissenter's objection was faulty. Accordingly, the court ordered that "to protect against the danger that the objecting members' funds will be used . . . to finance the

*(Footnote continued on following page)*

## INTEREST OF *AMICUS CURIAE*

The Wisconsin Bar has been at the forefront of integrated bar issues since its integration rule was upheld in the face of a First Amendment challenge in *Lathrop v. Donohue,* 367 U.S. 820, *reh'g denied,* 368 U.S. 871 (1961). The Wisconsin Bar is now among 33 integrated bars across the country facing actual or potential damage claims for past conduct. Should the Court reach the question of past damages in this matter, the Wisconsin Bar's experience to date in litigating such claims brings a unique perspective to this issue.

The Wisconsin Bar was established as an integrated bar under interim rules promulgated by the Supreme Court of Wisconsin in 1956. Two years later integration became permanent. Despite receiving the imprimatur of this Court in *Lathrop,* the Wisconsin Supreme Court nevertheless was prompted in 1988 to suspend its long-standing integration rule by a decision of the District Court for the Western District of Wisconsin declaring the rule unconstitutional. *See Levine v. Supreme Court of Wisconsin,* 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan,* 864 F.2d 457 (7th Cir. 1988), *cert. denied,* ___ U.S. ___, 110 S. Ct. 204 (1989).

During the pendency of the *Levine* case, this Court granted *certiorari* in *Keller v. State Bar of California,* ___ U.S. ___, 110 S. Ct. 46 (1989).[3] In *Keller,* this Court held for the first time that unified bar associations are subject to the same restrictions on the use of mandatory dues as those imposed on labor unions. While

*(Footnote continued from previous page)*
Bar's political activity, the Bar would have to calculate interest as of the date that payment of the members' bar dues was received." *Gibson v. The Florida Bar,* 906 F.2d 624, 632 (11th Cir. 1990) (*"Gibson II"*).

[3]The *Keller certiorari* petition was granted on the same day the *Levine certiorari* petition was denied. *See* ___ U.S. ___, 110 S. Ct. 204 (1989).



the *Keller* case was under submission to this Court, both the *Levine* case and a second case against the Wisconsin Bar, *Crosetto v. The State Bar of Wisconsin and Stephen L. Smay,* Case No. 88-C-433-C (W.D. Wis.), were stayed.

The *Crosetto* case is a purported class action which demands, among other relief, some $500,000 in "compensatory damages" and $600,000 in punitive damages. The plaintiffs' theories in *Crosetto* include allegations that the Wisconsin Bar intentionally violated plaintiffs' constitutional rights by, for example, funding allegedly political and ideological speech out of mandatory dues, and seeking to delay the institution of a dues reduction plan for sums spent on legislative activities.

Following this Court's decision in *Keller,* the *Levine* case was dismissed by the district court on February 22, 1991. At the time *Levine* was dismissed, the Wisconsin Supreme Court had not reinstated (and to this date has not reinstated) the mandatory membership rule,[4] and the *Levine* plaintiffs sought only declaratory and injunctive relief. Accordingly, the district court held that there was no justiciable case or controversy:

> Plaintiffs are not seeking any damages for injuries they may have suffered in the past from the bar's use of their mandatory dues. Whether they will suffer any injury in the future is solely a matter of conjecture. It depends on the bar's adopting and presenting a petition for reinstating the mandatory bar membership requirement and on the [Wisconsin

[4]By order dated March 6, 1991, the Wisconsin Supreme Court stated that notwithstanding its inherent power to reinstitute a mandatory bar, it would not do so "until, in response to a petition filed by the State Bar or other interested person or on the Court's own motion, the Court holds a public hearing and considers any legal requirements necessary for the governance of a mandatory bar, including *Keller v. State Bar of California* . . . that evolved subsequent to the inception of *Levine, et al. v. Heffernan, et al.*" 64 Wis. Law. 39 (May 1991). Following careful and extensive discussion, the Wisconsin Bar petitioned the Wisconsin Supreme Court on May 16, 1991 to reinstate the mandatory membership rule.

> Supreme] Court's agreeing to the proposal. Even if this occurs, whether plaintiffs will suffer a constitutional injury of the sort they allege here is another matter for conjecture. If the scheme proposed by the bar and approved by the court for ensuring that bar dues are not used for constitutionally impermissible reasons meets the standards set in *Keller*, it is improbable that plaintiffs will have any basis for maintaining a suit against these defendants.

*Levine, et al. v. Heffernan, et al.*, No. 86-C-578-C (W.D. Wis. Feb. 21, 1991).

The *Crosetto* case, however, marches on. On March 29, 1991, the Wisconsin Bar (and the individual defendant, the Bar's Executive Director) filed a comprehensive motion for summary judgment in *Crosetto*. That motion seeks, *inter alia*, dismissal of plaintiffs' claims for "monetary damages" based on conduct which substantially preceded the *Keller* decision on three separate grounds:

(1) That the Wisconsin Bar and its Executive Director are entitled to qualified immunity;

(2) That the *Keller* decision should not be applied retroactively; and

(3) That, in any event, plaintiffs were required, and failed to make the contemporaneous objections necessary to allow them to now assert a right to any dues recovery.

The Wisconsin Bar's motion is now fully briefed and under consideration.[5]

*Amicus curiae* Wisconsin Bar is aware that this Court may never reach issues of past damages or recovery in this appeal. If

[5]The Wisconsin Bar did not advance an Eleventh Amendment defense as part of its summary judgment motion in light of the district court's earlier finding in *Levine* that the structure and activities of the Wisconsin Bar do not support that defense. *Levine*, 679 F.Supp. at 1487-88. *But see Bishop v. State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986). Accordingly, *amicus curiae* Wisconsin Bar will not address the Florida Bar's entitlement to that defense in this case. Instead, this brief will address other defenses to damage claims for past conduct.



for whatever reason, however, this Court does reach these issues, the Wisconsin Bar requests that the positions and arguments stated herein be considered, as this Court's decision on these issues could prevent a flood of suits brought by "dissenters" against the Wisconsin Bar or any of the 32 other integrated bars around the country.

## SUMMARY OF ARGUMENT

In *Lathrop v. Donohue*, this Court upheld the concept of an integrated bar against constitutional challenge but declined to address the issue of whether ideological or political speech or activities could be funded with mandatory dues. 367 U.S. at 843-48.[6] In *Keller v. State Bar of California*, ___ U.S. ___, 110 S. Ct. 2228 (1990), this Court, applying its analysis from the union cases, held for the first time that the use of mandatory dues to fund political or ideological speech or activities was restricted. Thus, the Court held that mandatory dues could be used to fund political or ideological activities which are germane to the goals of "regulating the legal profession and improving the quality of legal services." *Keller*, 110 S. Ct. at 2236. Finally, the Court held that a dues reduction plan similar to the one approved in *Chicago Teachers Union, Local No. 1 v. Hudson*, would be sufficient to accommodate the constitutional rights of dissenters. ___ U.S. at ___, 110 S. Ct. at 2237. In *Keller*, however, this Court did not address a number of other issues, such as whether its decision

[6]Significantly, the Court declined to do so on the same day it held that labor unions could not use compelled dues for such purposes. *See International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). Although *Street* was a case of statutory construction, the Court expressly construed the statute to avoid "serious doubt" of its constitutionality. *Id.* at 749. Thus, *Street* "necessarily provide[d] some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, 1991 U.S. Lexis 3017, *17 (May 30, 1991).

should be applied retroactively, or if applied retroactively, whether mandatory bars would be entitled to defenses based either on the giving of notice or their reliance on the state of the law.

The Wisconsin Bar respectfully submits that if this Court addresses the issue of retroactive relief, it should now declare that *Keller* is not to be applied retroactively and that mandatory bars were not acting at their financial peril in failing to anticipate the *Keller* decision. *Keller* declared new law, and established a new constitutional standard; to apply it retroactively to "create" a plethora of damage or restitutionary claims by dissenters (declared or undeclared) would work an extreme hardship on mandatory bars and would be manifestly unjust.

## ARGUMENT

### I.

### THE COURT'S DECISION IN *KELLER* SHOULD NOT BE APPLIED RETROACTIVELY

As a general rule, judicial decisions are to be applied retroactively. *Solem v. Stumes,* 465 U.S. 638, 642 (1984). In order to ameliorate the sometimes harsh results which would flow from the mechanical application of this principle, however, this Court has recognized certain exceptions to the general rule. *Anton v. Lehpamer,* 787 F.2d 1141, 1143 (7th Cir. 1986) (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982)).

In *Chevron v. Huson,* 404 U.S. 97 (1971), this Court set forth a three-prong test to be used in determining whether a judicial decision should be applied retroactively.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."



*Id.* at 106-07 (citations omitted).

Clearly, the first prong of the *Chevron* test is met. The holding of *Keller* established a new principle of law both generally and specifically: (1) generally, *Keller* established for the first time that the First Amendment cases in the union context are applicable to integrated bars, and (2) specifically, *Keller* altered, to at least some degree, the purposes for which an integrated bar may undertake political or ideological activities. *See Keller,* 110 S. Ct. at 2235-37.[7]

Moreover, it is plain on the face of the *Keller* decision that the application of its standards remains uncertain. *See id.* at 2237 ("Precisely where the line falls between those state bar activities in which the officials and members of the bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern."). *Cf. Lehnert v. Ferris Faculty Ass'n, supra* note 6. The *Keller* decision also left open to question what procedures must be instituted to protect the First Amendment interests recognized in that decision. *See Keller* at 2237-38

[7]The district court in *Levine, supra,* in an unpublished order, applied the *Chevron* test to find the claims of dissenters for past relief in that case were barred. *See Levine, et al. v. Heffernan, et al.*, No. 86-C-578-C (W.D. Wis. May 6, 1988).

("Whether one or more alternative procedures would likewise satisfy the obligation are better left for consideration upon a more fully developed record.").[8]

Integrated bar associations should not be penalized for not being prescient. The procedural rights imposed in *Keller* were not "clearly foreshadowed," nor are they settled to this day.

Indeed, this Court rejected retroactive application under just such a set of circumstances in *Florida v. Long*, 487 U.S. 223 (1988). In that case, the State of Florida adopted changes to its procedures for funding its pension plans in order to comply with an earlier Supreme Court decision that invalidated sex-differentiated contributions. *See Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702 (1978). Five years after *Manhart* this Court held that not only were sex-differentiated *contributions* unallowable, but sex-differentiated *benefits* were similarly forbidden. *See Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983). In the wake of *Norris*, Florida adopted a plan that resulted in the same benefits being paid to all pensioners, regardless of sex. The state was then sued by pensioners who argued that the unisex benefits plan should have been adopted immediately following the Court's decision in *Manhart. Long,* 487 U.S. at 227-28.

In holding that liability could not be imposed against the state for "pre-*Norris* conduct," the Court noted that prior to its decision in *Norris,* there was some doubt regarding the parameters of the *Manhart* requirements. *Id.* at 231-33. Given these uncertainties, the Court found that retroactive imposition of liability would

[8]Indeed, it was not until the Court's 1986 decision in *Hudson,* nearly ten years after its decision in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), that the Court gave any definition of the contours of the procedures required in the union dues context. Even then, the requirements imposed upon unions by the Court's decision were far from clear. It is apparent from the Court's decision in *Keller* that these issues are still evolving. *See Keller,* 110 S. Ct. at 2237.



be inappropriate. *Id.* at 235. For the same reason—that is, doubt about the application of the First Amendment to the use of mandatory bar dues, as well as the uncertain parameters of acceptable procedures to protect the rights of dissenting bar members—retroactive imposition of liability for pre-*Keller* conduct would be inappropriate in the integrated bar context.

The second prong of the *Chevron* test has no real application in this context. As this Court has stated, retroactive application is appropriate only where necessary "to deter deliberate violations [of] or grudging compliance [with]" the new rule. *Long,* 487 U.S. at 230. There is nothing to suggest that integrated bars have purposely failed to comply with the law or will do so only if "pushed." Indeed, in light of the uncertainty of the law prior to *Keller,* any such suggestion would be unwarranted. *See also* Part II, *infra*.

Finally, it is plain that a retroactive monetary award or refund would work a substantial hardship on integrated bars within the meaning of the third prong of the *Chevron* test. If retroactive relief were allowed, integrated bars would arguably be liable for the refund of dues to an as yet undeterminable number of lawyers for an as yet undeterminable number of years.

In sum, under each of the three prongs set forth in *Chevron,* the decision in *Keller* should not be applied retroactively.

## II.

## THE DOCTRINE OF QUALIFIED IMMUNITY PROTECTS INTEGRATED BARS FROM CLAIMS FOR PAST DAMAGES

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court held that in an action brought under 42 U.S.C. § 1983, defendants "are shielded from liability" by the doctrine of qualified immunity

"insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Although this Court did not fully explain in *Harlow* what it meant by the phrase "clearly established constitutional rights," *see discussion Benson v. Allphin,* 786 F.2d 268, 275-76 (7th Cir.), *cert. denied,* 479 U.S. 848 (1986), subsequent decisions have fleshed out the meaning of that phrase. In *Anderson v. Creighton,* 483 U.S. 635, 640 (1987), this Court explained that the cases construing *Harlow* "establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable [official] would understand that what he is doing violates that right." In other words, "in light of preexisting law the unlawfulness must have been apparent." *Id.* (citations omitted).[9]

Under this standard, it is manifest that the constitutional rights of mandatory bar dissenters were not "clearly established" under the law prior to this Court's decision in *Keller.* On the contrary, even the basic issue of the applicability of First Amendment protection to lawyers in an integrated bar setting was open to question. Prior to *Keller, Lathrop* was "the last Supreme Court decision squarely to address the First Amendment rights of lawyers in an integrated bar." *Gibson v. The Florida Bar,* 798 F.2d 1564, 1567 (11th Cir. 1986) ("*Gibson I*"). The *Lathrop* Court, however, expressly declined to consider whether the First Amendment might be implicated by an integrated bar's use of mandatory dues to support its legislative program, and Justice Harlan argued in an emphatic concurring opinion that any First Amendment impingement was at best "chimerical." *Lathrop,* 367 U.S. at 864.

[9]This rule was more pointedly articulated by the Court in *Malley v. Briggs,* 475 U.S. 335, 341 (1986), when it observed that the defense of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."



Thus, until *Keller,* the question of whether and how the First Amendment standards set forth in the union cases were applicable to integrated bars remained open. *See, e.g., Keller v. State Bar of California,* 47 Cal. 3d 1152, 255 Cal. Rptr. 542 (1989) (for the purposes of First Amendment analysis, integrated bar would be viewed as a governmental agency rather than a labor union); *Falk v. State Bar of Michigan,* 418 Mich. 270, 342 N.W.2d 504 (1983) (integrated bar's use of mandatory dues in connection with political activities advances a substantial governmental interest which outweighs any infringement of dissenters' First Amendment interests). While it is true that a few—and for the most part recent—lower court decisions since *Lathrop* had concluded that the First Amendment does restrict an integrated bar's use of mandatory dues (most notably the Eleventh Circuit in *Gibson I* and the United States District Court in *Arrow v. Dow,* 544 F. Supp. 458 (D.N.M. 1982)), the United States Supreme Court "establish[ed] *for the first time* [in *Keller*] that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues." *Schneider v. Colegio de Abogados de Puerto Rico,* 917 F.2d 620, 624 (1st Cir. 1990) (emphasis supplied). Given the uncertainty of the law prior to *Keller,* the collection and use of mandatory bar fees can hardly be said to have violated dissenters' "clearly established" constitutional rights.

The doctrine of qualified immunity is designed to relieve officials "from having to decide, at their financial peril, how judges will balance these issues [of constitutional rights] in years to come. Governmental employees must obey the law in force at the time but need not know that in the fight between the broad and narrow readings of precedent the broad reading will become ascendent." *Greenberg v. Kmetko,* 922 F.2d 382, 385 (7th Cir. 1991). Accordingly, this Court should make clear, should it reach the question of relief for past conduct, that in light of the uncertainty of the law prior to *Keller,* the doctrine of qualified immunity is available to protect integrated bars from such claims.

## III.

## A "CONTEMPORANEOUS OBJECTION" SHOULD BE A CONDITION PRECEDENT TO ANY CLAIM FOR PAST DAMAGES

In any claim for a refund of mandatory dues collected and expended by a union for conduct allegedly prohibited by the First Amendment, a plaintiff must establish, as a threshold matter, that he made contemporaneous objections to the use of his mandatory dues for each year in question. *See Hudson,* 475 U.S. at 305 n.16; *Abood,* 431 U.S. at 237-41; *Brotherhood of Ry. and S.S. Clerks v. Allen,* 373 U.S. 113, 118-19 (1963). In other words, "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *International Ass'n of Machinists v. Street,* 367 U.S. at 774.

The rationale for requiring a contemporaneous objection is manifest. "The union receiving money extracted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Id.* The burden imposed on the dissenting dues payor is a slight one. The member need not make an objection to each specific expenditure that he finds objectionable; rather, "it is enough that he manifests his opposition to *any* political expenditures . . . ." *Allen*, 373 U.S. at 118 (footnote omitted) (emphasis in original). As this Court has recognized, the lack of a requirement that the dissenter make his objection known would encourage "free riders"—those who would attempt to profit from the objections of others, while themselves remaining silent. *Street*, 367 U.S. at 774.

Absent such an objection—particularly given the nature of their vocal and legally sophisticated constituencies (*i.e.*, lawyers) —mandatory bars had a right to spend dues in ways that were fully known to (or knowable by) each member. Indeed, it does



not require much foresight to see the result of not imposing such a requirement: bar members who in all probability had never considered the issue would suddenly give voice to their new-found "secret objection" to the expenditure of their dues, and line up for their portion of a dues rebate windfall. Thus, any would-be plaintiff seeking relief for past damages against an integrated bar should also be required to establish that he made a contemporaneous objection to the use of his mandatory dues.[10]

## CONCLUSION

As manifested by the *Gibson* case itself, mandatory bars such as the Florida Bar and the Wisconsin Bar have been subjected to endless, and at times harassing, litigation over the last ten years. Finally, in *Keller,* this Court attempted to state and clarify substantive First Amendment principles as they apply to mandatory bars.

However, this Court did not address in *Keller* the implications of its decision on pending (or future) claims for damages based on pre-*Keller* conduct. It may be that this case, as well, will not present the Court with the opportunity to comment on claims for past damages or refunds.

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[10]As the District Court in *Levine* stated in its order denying the *Levine* plaintiffs' motion to certify a class which included lawyers who had not made contemporaneous objections to the use of their dues:

> [p]laintiffs' claim that they are constitutionally entitled to a refund of bar dues is premised entirely on [*Abood*, *Street* and *Hudson*]. I see no reason why the requirement that dues payors make known their objections to the expenditure of their dues for political purposes should not be applied to the bar context as well. *There is no greater reason to presume that a lawyer objected to certain uses of his Bar dues than to presume that an employee objected to certain uses of union dues. The interests protected are virtually identical, and the requirements for voicing dissent should be identical as well.*

*See Levine v. Heffernan, et al.,* No. 86-C-578-C (W.D. Wis. May 6, 1987) (emphasis supplied).

If, however, this Court does address the issue of relief for past "violations," *amicus curiae* Wisconsin Bar respectfully requests that this Court take the opportunity to declare that the *Keller* case should be applied only prospectively and that principles of qualified immunity and the requirement of a contemporaneous objection apply with full force and effect in the integrated bar context.

Dated this 6th day of June, 1991.

Respectfully submitted,

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